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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

NO. 580

KENNETH GEORGE HANAUER AND JACK A. CRABILL,
*Appellants*

vs.

WILSON H. ELKINS,
President of University of Maryland, ET AL.,
*Appellees*

**ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND**

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*Appellees*

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## ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

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## JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Court of Appeals of Maryland, entered on June 3, 1958, affirming the denial of appellants' petitions for writ of mandamus, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

## OPINIONS BELOW

The Trial Court in the case of *Hanauer* v. *Elkins et al* issued an opinion which is not reported and which is set forth hereinafter (App. 1-10).

The Trial Court in the case of *Crabill* v. *Elkins et al* issued an opinion which is not reported and which is set forth hereinafter (App. 11-15).

The Court of Appeals of Maryland consolidated these cases for hearing and consideration, and the Court's opinion is reported in 217 Md. 213, 141 A 2d 903. This opinion is set forth hereinafter (App. 16-24).

## JURISDICTION

Kenneth George Hanauer and Jack A. Crabill, conscientious objectors, each petitioned the Circuit Court for Prince George's County, Maryland, pursuant to Article 60 of the Annotated Code of Maryland (1951 Ed.), for a writ of mandamus directing the President and the Board of Regents of the University of Maryland to admit each to enrollment in the University without requiring him to take military instructions in the United States Air Force Reserve Officer Training Corps contrary to his religious beliefs.

Each petition alleged that the regulations of the University of Maryland and the requirement of the President and Regents of the University that religious conscientious objectors take military training as a condition of enrollment violated the First and Fourteenth Amendments of the Constitution of the United States in that they were an infringement of the free exercise of petitioners' religion; they were arbitrary and discriminatory as applied to petitioners and that they deprived petitioners of equal protection of the laws and of an immunity from military training which each petitioner had under federal law as a citizen of the United States.

The petition of Hanauer was denied on July 19, 1957, by the Circuit Court for Prince George's County and, on January 14, 1958, the same Court sustained a demurrer to the similar petition of Crabill.

By order of January 25, 1958, the Court of Appeals of Maryland consolidated the Crabill and the Hanauer cases for the purpose of argument and consideration. The Court

of Appeals considered, *inter alia*, the issues raised under the First and Fourteenth Amendments of the Federal Constitution (App. 21ff) and affirmed the judgments below in an opinion filed June 3, 1958. Notice of Appeal was filed in the Circuit Court for Prince George's County, Maryland, on August 27, 1958.

The jurisdiction of the Supreme Court to hear this appeal rests upon 28 USC Sec. 1257 (2). This jurisdiction is believed to be sustained by the following cases in which the Supreme Court took jurisdiction on appeals involving similar issues under the First and Fourteenth Amendents: *Hamilton* v. *Regents* 293 US 245,79 L. Ed. 343; *McCollum* v. *Board of Education* 333 US 203, 92 L. Ed. 649, 68 U.S. 461.

## STATUTES INVOLVED

In this case appellants contended in the court below that certain State statutes, as applied, were repugnant to the Constitution and laws of the United States, and the decision rendered by the court below was in favor of their validity. State legislation empowered and authorized the making of regulations by the University of Maryland; it is the validity of certain of these regulations, as applied to petitioners by the President and Regents of the University, that is here questioned.

By these regulations, exemption from compulsory military training at the University is set forth as follows in the catalog of the University of Maryland, quoted in the opinions below (App. 3, 12):

> "BASIC EXEMPTION FROM MILITARY INSTRUCTION
>
> 1. Students who have completed the basic course in other approved units of the United States Air Force, Army, or Naval R. O. T. C. will receive credit.
>
> 2. Students holding commissions in the Reserve Corps of the Army, Navy, Marine Corps, Coast Guard, or Air Force will receive credit.

3. Students who have served in the Army, Navy, Marine Corps, Coast Guard, or Air Force for a period of time long enough to be considered equivalent to the training received in the A. F. R. O. T. C. program will receive credit. Short periods of service in any of the branches named about will be evaluated and allowed as credit toward completion of the course.

4. Graduate students will be exempt.

5. Students classified as "special students" who are registered for less than seven semester hours will be exempt.

6. Students who have passed their thirtieth birthday before starting the course will be exempt from any part of the course not already completed.

7. Students who are not citizens of the United States or one of its territorial possessions will be exempt. Students having applied for United States citizenship will not be exempt."

These regulations are issued pursuant to the powers vested in the Regents under the Charter of the University (Laws of Maryland, Kilty, Harris, Watkins, 1807-1813, Vol. IV. Laws made and passed by the General Assembly of the State of Maryland, November 1812, Chapter 159, passed December 29, 1812.)

"2. AND BE IT ENACTED, That the said University shall be founded and maintained for ever upon the most liberal plan, for the benefit of students of every country and every religious denomination, who shall be freely admitted to equal privileges and advantages of education, and to all the honors of the University, according to their merit, without requiring or enforcing any religious or civil test, urging their attendance upon any particular plan of religious worship or service, nor shall any preference be given in the choice of a provost, professor, lecturer, or other officer of the said University, on account of his particular religious professions, but regard shall be solely had to his moral character, and other necessary qualifications to fill the place for which he shall be chosen.

* * * *

11. AND BE IT ENACTED, That the said regents and their successors, shall meet at least once a year, in stated annual meetings, to be appointed by their own ordinances, and at such other times as by their said ordinances they may direct, in order to examine into all matters touching the discipline of the institution, and the good and wholesome execution of their laws; and that the said regents, when duly assembled, shall have full power and authority to make their own rules of proceeding, and to make fundamental regulations for the government and discipline of the University, in all which meetings a majority of the whole number of regents shall be a quorum to do any business, except to vacate the seat of the provost of said University, or of any of the professors or lecturers, for which purpose the consent of three-fourths of the whole number of the regents shall be necessary, and then only on a formal impeachment."

The Federal statute here involved is the Universal Military Training and Service Act, June 24, 1948, c. 625, Title I, Sec. 6, 62 Stat. 604, as amended June 19, 1951, c. 144, Title I, Sec. 1, 65 Stat. 75; Title 50, USCA App. Sec. 451. Prior to seeking enrollment at the University of Maryland, the petitioners had been drafted and each had rendered two years of service as conscientious objectors under the provisions of Section 6(j) of this Act:

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. *Any person claiming exemption from combatant training and service* because of such conscientious objections whose claim is sustained by the local board *shall*, if he is inducted into the armed forces under this title, be

assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, *in lieu of such induction, be ordered by his local board*, subject to such regulations as the President may prescribe, *to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate* * * *" (Emphasis added)

## QUESTIONS PRESENTED

The following questions are presented by this appeal: Whether the action of the University of Maryland denying enrollment to these conscientious objectors unless they undergo military training:

(1) Violates the First Amendment of the Federal Constitution by effecting a religious test for enrollment and by prohibiting the free exercise of petitioners' religion?

(2) Violates the Fourteenth Amendment of the Federal Constitution by abridging the immunity of petitioners, as citizens of the United States, from being subjected to military training?

(3) Violates the Fourteenth Amendment of the Federal Constitution by denying petitioners the equal protection of the laws and due process of law, the University refusing exemption from its military training requirement to petitioners, who had been drafted and served as conscientious objectors under the Selective Service System while at the same time exempting from such requirement others who had been drafted and served under the Selective Service System?

## STATEMENT OF THE CASE

The petition for writ of mandamus of each appellant was treated by the court below as involving identical

questions. The Circuit Court for Prince George's County, Maryland, denied the petition in the Hanauer case and sustained a demurrer to the Crabill petition. These judgments were affirmed by the Maryland Court of Appeals.

The facts are not in dispute. Appellants are both conscientious objectors to military training and service, and each has been drafted under the Selective Service Act for the alternate service provided by Section 6(j) of that Federal Act for such religious objectors. Each has served two years in such work.

Each sought enrollment in the chief State educational institution in Maryland, the University of Maryland, without being required to take the two-year basic United States Air Force Reserve Officer Training Corps. The University requires all male students to take this course unless they come within one of the specific exemptions for: students over thirty years of age; graduate students; "special students"; students neither United States citizens nor applicants for United States citizenship; students holding reserve commissions in, or who have completed the basic R.O.T.C. course in one of the armed forces; and students who have had equivalent training by service in one of the armed forces. Conscientious objectors are not expressly exempted.

It is conceded that each appellant is in all respects qualified for and entitled to such enrollment with the single alleged exception that neither could, because of his religious convictions, take the prescribed military training course. The nature of this course is summarized in the opinion of the court below (App. 18):

> "The basic course involves learning to engage in military drill as a unit, and the wearing of an Air Force uniform. . . . United States Air Force officers conduct all classroom academic work and supervise drill on the field. Regulations concerning the type of training offered by the courses are the regulations of

the United States Air Force which have been adopted by the University."

This basic course in military training was required of petitioners by the University as a condition of their enrollment (App. 19, 20), and, having made their position clear to the University authorities and having been denied enrollment, petitioners instituted these mandamus proceedings.

**How the Federal Question is Presented**

As stated in the opinion of the Maryland Court of Appeals, "The appellants invoke the protection of the First and Fourteenth Amendments of the Federal constitution." (App. 21) These constitutional questions were first raised in Paragraph 16 of each petition for writ of mandamus wherein Hanauer and Crabill alleged that the action of the University prohibited the free exercise of religion protected by the First Amendment and violated the privileges and immunities, the equal protection of the laws, and the due process clauses of the Fourteenth Amendment. In its opinion in each of these cases the trial court recognized that these constitutional questions had been raised (App. 2, 6, 13).

In its review the Maryland Court of Appeals dealt at length with these same constitutional issues (App. 21-24). Although noting that *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 63 S.Ct. 1178, made material a consideration of whether the acts complained of had any "substantial or apparent relation to the public welfare", and that the dissent of Mr. Justice Frankfurter in the *Barnette* case cast doubt as to whether the *Hamilton* case could be reconciled with *Barnette*, the court below declined to pass upon the ultimate question of the effect of the *Barnette* and other cases on the *Hamilton* decision, saying: "We need not speculate where the line may ultimately be drawn or redrawn." (App. 23)

## THE FEDERAL QUESTION IS SUBSTANTIAL

As will be shown in more detail below, the Federal question is substantial because here involved, in a new and different context of statutory and of case law, is a constitutional issue which the United States Supreme Court considered more than twenty years ago in *Hamilton* v. *Board of Regents*, 293 U.S. 245, 79 L. Ed. 343 (1934). Since that time selective service legislation has established the Federal policy to recognize conscientious objectors and to relieve them from military training and service, and since that time decisions of the Supreme Court have established the three propositions: that where a State undertakes to provide University education the terms of availability of such education must be equal to all; that, absent a clear showing of public need, the freedom of religion clause of the First Amendment protects conscientious objectors from being compelled by State educational officials to violate their religious tenets; and that the doctrine of the *Macintosh* and *Schwimmer* cases (which was a chief foundation of the Hamilton case) is no longer law.

Hanauer and Crabill registered under the provisions of the Universal Military Training and Service Act (62 Stat. 604, as amended 65 Stat. 75, 50 USCA App. 456) and, upon showing that they were opposed to military training by reason of their religious convictions, they were exempted from all military training and service under the provisions of Section 456(j) of that Act, and assigned by Selective Service to work of national importance for a period of two years. After completion of this work, they were denied enrollment in the University of Maryland solely because they refused to take the R.O.T.C. military training given there by the United States Air Force under authority of federal legislation (August 10, 1956, c. 905, 70A Stat. 568, §§ 9381-9387).

The ruling of the University and of the State courts effectively denies these two young men the right to an education at their State University. *The ruling, as here applied, is that no Conscientious Objectors (Selective Service Class I-O) are allowed to go to the University of Maryland.*

Moreover, while perhaps half of the Land Grant colleges in the country have administratively resolved this problem in a fair manner, the University of Maryland and some of the other Land Grant colleges refuse to do so. According to Selective Service Headquarters, there are now about 1800 young men who, by reason of religious convictions, are serving their country in civilian work contributing to the maintenance of the national health, safety or welfare under the provisions of the Selective Service Act, in lieu of military service. Some of these men, and others to come, will be vitally affected by the decision in this case.

Obviously the United States Air Force lacks authority to require training or service of conscientious objectors exempted by the Universal Military Training and Service Act. However the court below justifies such military training of appellants by the University on the rationale that the R.O.T.C. program is a "State policy in the training of its youth". On the contrary, the United States Air Force Reserve Officer Training Corps program is a Federal policy, established, supported, conducted and controlled by the Federal Government under laws passed by the Federal Congress. (August 10, 1956, C. 905, 70A Stat. 568, §§ 9381-9387) The R.O.T.C. program is a part of the Federal government's machinery for building up its military forces. It is certainly a part of some military establishment, and there is no suggestion or evidence that it is in any sense a part of the State's militia or other military establishment. The State of Maryland does not have any military program for "the training of its youth" at any of the other State colleges, and the offering of military train-

ing was started at the University of Maryland only after 1868 and because the Federal Government exacted that requirement under the Morrill Act (July 2, 1862, C. 130, § 1, 12 Stat. 503-505, as amended; 7 U.S.C.A. 301-8) in return for the free land grant to the State of Maryland. As a matter of fact the R.O.T.C. program at the University is and can only be given there by reason of legislation passed by the United States Congress (Sections 9381-9387 under Chapter 905 entitled "Air Force Reserve Officers' Training Corps", of Title 10 entitled "Armed Forces", 70A Stat. 568, material portions of which are set forth in the margin.*

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* (August 10, 1956, c. 905, Title 10, 70A Stat 568)
Sec. 9382. Establishment and Composition

(a) The President may establish and maintain in civil educational institutions an Air Force Reserve Officers' Training Corps . . .

* * * *

(c) No unit may be established or maintained at an institution, unless—

* * * *

(3) the authorities of the institution, other than a State university or a State institution required to provide military instruction under section 304 of title 7, agree . . .

Sec. 9384. Courses of Training.

The Secretary of the Air Force may prescribe standard courses of theoretical and practical military training for units of the Air Force Reserve Officers' Training Corps. No unit may be established or maintained at an institution unless it provides the course of military training prescribed by the Secretary and unless its students who are taking that training devote to it an average of at least three hours a week during an academic year, except as prescribed under Section 9383 of this title.

Sec. 9386. Supplies and Uniforms.

(a) Under such conditions as he may prescribe, the Secretary of the Air Force may issue to institutions at which units of the Air Force Reserve Officers' Training Corps are maintained—

(1) public animals and forage for them;

(2) means of transportation, arms, ammunition, supplies, and tentage; and

It is the Federal and not the State government which controls the R.O.T.C. program, and thus the State of Maryland transgresses the authority of the Federal Government and burdens Federal policy when the State seeks to require Hanauer and Crabill to take military training under the United States Air Force at the State University when appellants have already been exempted from such training by the provisions of the Universal Military Training and Service Act.

In 1934, this Court, in *Hamilton* v. *Board of Regents*, 293 U.S. 245, 79 L. Ed. 343, held that the University of California need not exempt from R.O.T.C. two students who claimed to be Conscientious Objectors. However, the background of statutory and case law in which the issue is posed today is very different in the following material respects:

(a) In the mid-1930's there was no Federal draft act, or in fact any law, State or Federal, respecting conscientious objection. And obviously Hamilton had not been

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(3) uniforms, except that he may pay commutation at a rate fixed by him annually instead of uniforms.

(b) The Secretary may authorize such expenditures as he considers necessary for the efficient maintenance of the Corps.

* * *

(August 10, 1956, c. 843, Title 10, 70A Stat. 526)

Sec. 8540

(a) The President may detail regular or reserve members of the Air Force for duty as professors and assistant professors of air science and tactics, and as military instructors, at educational institutions where units of the Air Reserve Officers' Training Corps are maintained.

(b) The Secretary of the Air Force may detail regular or reserve members of the Air Force for duty as professors and assistant professors of air science and tactics, and as military instructors, at schools and colleges, other than those covered by section 9382 of this title, having a course of military training prescribed by him and having not less than 100 physical fit male students who are at least 14 years of age.

drafted for or served any type of compulsory work of national importance in lieu of military service.

(b) Hamilton was asking the University of California to set up the machinery necessary to pass on his conscientious objection. Hanauer and Crabill have already been so classified under Federal law, and are merely asking that the State's policy be consistent with the exertion of the authority of the Federal Government.

(c) Since the Hamilton decision, the *rights* of citizens to attend State-supported facilities for higher education have been developed in judicial decisions. *University of Maryland* v. *Murray*, 169 Md. 478, 182 A. 590; *Sipuel* v. *Board of Regents*, 332 U.S. 631, 68 S. Ct. 299; *Brown* v. *Board of Education*, 347 U.S. 483, 74 S. Ct. 686.

(d) The philosophy of the Hamilton case was basically upset when this Court in *Girouard* v. *U. S.*, 328 U.S. 61, 66 S. Ct. 826, and *Cohnstaedt* v. *I & NS*, 167 Kan. 451, 207 P 2d 425, reversed without opinion, 339 U.S. 901, 94 L. Ed. 1331, reversed the cases of *U. S.* v. *Macintosh*, 283 U.S. 605, 75 L. Ed. 1302 and *U. S.* v. *Schwimmer*, 279 U.S. 644, 49 S. Ct. 448 on which the Hamilton opinion had relied heavily.

Furthermore, if need be, we are prepared to urge that the Hamilton decision is no longer sound law in light of Federal legislation since 1934:

> Section 5 of the Selective Training and Service Act of 1940, 54 Stat. 885, Ch. 720;
>
> Section 6(j) of the Selective Service Act of 1948, 62 Stat. 604, Ch. 265, 50 U.S.C. App. 456(j);
>
> Section 6(j) of the Universal Military Training and Service Act, June 24, 1948, C 625, Title I Sec 6, 62 Stat 604, as amended June 19, 1951, C. 144, Title i, Sec 1, 65 Stat. 75; 50 USCA App. Sec. 451.
>
> Section 337 of Immigration and Nationality Act, Act of June 27, 1952, c. 477, 66 Stat. 166; 8 U.S.C.A., Section 1448.

And in light of this Court's reinterpretation of the Federal Constitution—with respect to religious liberty:

*West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 87 L.Ed. 1628, 63 S. Ct. 1178 (1943);

*Everson* v. *Board of Education*, 330 U.S. 1, 67 S Ct. 504 (1947);

*McCollum* v. *Board of Education*, 333 U.S. 203, 68 S. Ct. 461 (1948);

*Zorach* v. *Clausen*, 343 U.S. 306, 72 S. Ct. 679 (1952)

And with respect to the right to attend State schools:

*Sipuel* v. *Board of Regents*, 332 U.S. 631, 92 L. Ed. 247, 68 S Ct. 299;

*Brown* v. *Board of Education*, 347 U.S. 483, 74 S. Ct. 686;

*Bolling* v. *Sharpe*, 347 U.S. 497, 74 S Ct. 693;

*Frasier* v. *Board of Trustees*, 134 F. Supp. 589 at 592 (U.S.D.Ct. M.D., N.C. 1955), 350 U.S. 979, 100 L. Ed. 848;

*Lucy* v. *Adams*, 134 F. Supp. 235, affd 228 F. 2d 619, affd 350 U.S. 1, 100 L. Ed. 3

And with respect to unequal protection and discrimination that results from the application by the State of a statute or ruling to a particular religious group:

*Niemotko* v. *Maryland*, 340 U.S. 268, 95 L. Ed. 267, 71 S. Ct. 325 (1951)
*Fowler* v. *Rhode Island*, 345 U.S. 67, 73 S. Ct. 526.

Therefore, we ask this Court to consider whether the University of Maryland, which is a land grant college, can impose as a price for the education to which these students are in all other respects entitled by law, the surrender of the immunity and exemption from military training and service granted them under the laws and constitution of the United States. We urge that the many Americans who oppose compulsory ROTC military train-

ing in state universities should have a ruling today on this question by the Supreme Court.

Respectfully submitted,

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IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

---

LAW NO. 8584

KENNETH GEORGE HANAUER,
Plaintiff

vs

WILSON H. ELKINS, PRESIDENT OF THE UNIVERSITY OF MARYLAND, ET AL
Defendants

---

*OPINION*

This case was heard by the Court without a jury, on a petition for a Writ of Mandamus directing the President and Board of Regents of the University of Maryland to permit Kenneth George Hanauer, the petitioner, who claims to be a conscientious objector to Military training, to pursue his studies at the University of Maryland without taking the prescribed basic course in military training.

At the conclusion of argument by counsel a memorandum was filed by petitioner but counsel for the defendants elected to submit on argument alone.

The memorandum of petitioner points out that "The question presented is whether the University may require, as a condition of enrollment, that a conscientious objector take a two year course in military training, where such requirement: (1) imposes a religious test for enrollment, and prohibits the free exercise of the religion of a conscientious objector to military training on religious grounds;

(2) Abridges the privilege of a citizen of the United States, who, under the United States Selective Service Act may not be required to take military training because he is a conscientious objector;

(3) denies equal protection of the laws and due process of law by exempting from compulsory military training requirement all persons who have been drafted under the Selective Service Acts except persons who, as the petitioner here, have been drafted by Selective Service and who have served their two years of compulsory service in such "work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate."

Briefly, the facts which were brought out by testimony of petitioner were as follows: That he was a resident of Baltimore, twenty-four years old, a student at the University of Maryland enrolled in the College of Education in September, 1956 and a Junior, having formerly attended Towson State Teachers College for two years. That he had served two years and one month under a Selective Service System work order at the Caroline Mission in St. Louis, Missouri, as a boys' club worker in lieu of Military training and was released in May, 1956, and contended he had no further obligation under Federal draft law. Made application to enter the University in April, 1956 and divulged he was a conscientious objector, believed he received a catalogue of the University and had engaged in correspondence with officials and later in September enrolled as a Junior but was not required to take R.O.T.C. Later, on making inquiry of University Officials concerning another student in the same category who was required to take R.O.T.C., he was notified to take R.O.T.C. and a deadline was set as of the end of January 1957, for him to enroll or leave the University.

In all other respects there appeared to be no question concerning his eligibility to remain as a student.

On cross examination petitioner stated in substance that he had decided to become a conscientious objector by reason of his personal point of view and that his denomination "has left it up to the individual."

He further stated that he felt he would fall in the category of a person who had fulfilled his obligation for the Country, and therefore it would be under this provision that he would come in. That he should be entitled to the same benefits as a man who served in military service.

Dr. Elkins, having been called as a witness for the plaintiff testified at length as to the policy of the University in requiring military training of conscientious objectors unless they fall within categories of exemption. These categories are specifically stated in the catalogue of the University, which was admitted in evidence and are:

1. Students who have completed the basic course in other approved units of the United States Air Force, Army, or Naval R.O.T.C. will receive credit.

2. Students holding commissions in the Reserve Corps of the Army, Navy, Marine Corps, Coast Guard, or Air Force will receive credit.

3. Students who have served in the Army, Navy, Marine Corps, Coast Guard, or Air Force for a period of time long enough to be considered equivalent to the training received in the A.F.R.O.T.C. program will receive credit. Short periods of service in any of the branches named above will be evaluated and allowed as credit toward completion of the course.

4. Graduate students will be exempt.

5. Students classified as "special students" who are registered for less than seven semester hours will be exempt.

6. Students who have passed their thirtieth birthday before starting the course will be exempt from any part of the course not already completed.

7. Students who are not citizens of the United States or one of its territorial possessions will be exempt. Students having applied for United States Citizenship will not be exempt.

Certainly, it would appear from all of the evidence in this case that the Board of Regents in developing its current policy had not *arbitrarily* applied the yardstick laid down by the foregoing *exemptions* in the case at bar, especially in view of the undisputed testimony of Dr. Elkins.

On the same page (15) of the University Catalogue under the sub-title "Requirements in Military Instruction", which falls under the general title shown on page 14, "General Educational Requirements For All Undergraduate Students", we find that "All male students unless specifically exempted under University rules are required to take elementary military training for a period of two years." "The successful completion of this course is a prerequisite for graduation, *but it must be taken by all eligible students during the first two years of attendance at the University, whether they intend to graduate or not.* (Italics supplied.)

Under the same general heading on page 14 of the catalogue we find "The Program In American Civilization", wherein "The first level is required of all freshmen or sophomores at the University", and "Physical Education Requirements For Men and Women", wherein "All undergraduate men and women students classified academically as freshmen or sophomores who are registered for more than six semester hours of credit are required to enroll in and successfully complete four prescribed courses in physical education for a total of four semester hours of credit. *These courses must be taken by all eligible students during the first two years of attendance at the University, whether they intend to* graduate or not." The classification of those students who are exempt follows and

the last category for exemption is: "*Students with military service may receive credit for these courses by applying to the Air Force R.O.T.C. Records Office.*"

The witness Tatum testified that he had wide experience in advising conscientious objectors and preparing guidance material for use in presenting cases before draft boards. He had testified in one naturalization case before a Federal Court wherein an objector was admitted to citizenship. He had been involved directly or as assisting counsel in many cases but all appear to have dealt with cases arising under the Selective Service Act so that his testimony was of little help here.

The testimony of Colonel Robert E. Kendig produced a comprehensive description of the conduct of R.O.T.C. training and the relationship between the University and the Air Force, the administration of primary control over the basic R.O.T.C. unit in cadet officers, and ultimate control in the University. The basic course was described as being "designed as a course training a man to better perform his duties as a citizen of the United States and of his community, to understand the impact of international tensions, world organization, the place of the United States in the family of nations, and his responsibility as a citizen to support his country." This is the required course for all male students who are not exempt as set forth in University regulations.

The advanced course, the Colonel testified, "is designed to train prospective second lieutenants for the Air Force." This course is not required, being purely elective as described in the catalogue of the University.

Counsel for plaintiff has attempted to link cases arising under the National Immigration Acts and the Selective Service Act with this case as well as Pearson v. Coale, 165 Md. 224, 167A 54, 290 U.S. 597, and Girouard v. United States, 328 U.S. 61, which overruled Macintosh and

Schwimmer, which he contends were relied on when the Coale case was decided. Particular stress is placed on University of Maryland v. Murray, 168 Md. 478, and others wherein, the principal as to opportunity of an education was stated by the court as, "Such an opportunity, where the State has undertaken it, is a right which must be made available to all on equal terms."

The Fourteenth Amendment (Section 1) of the United States Constitution has been cited;

> "No State shall make or enforce any law which shall abridge the *privileges or immunities of citizens of the United States* nor deny to any person within its jurisdiction the equal protection of the laws."

Sections of the Bill of Rights of the Maryland Constitution which deal with the privileges or immunities of citizens, all of which deal with discriminatory action against citizens.

Counsel has argued that it would be arbitrary and unreasonable and discriminatory for the University on two counts to require Hanauer to take A.F.R.O.T.C. military training:

> (a) That it is discriminatory for the University to exempt other students who have been drafted under the Selective Service Act, and not to exempt Hanauer.
>
> (b) That it is an unreasonable and arbitrary infringement of his religious convictions to require him to take A.F.R.O.T.C. military training.

The principal which was established by University of Maryland vs Coale, 165 Md. 324, that "The University of Maryland may suspend a student by reason of his refusal to take the regular prescribed course in military training, although such refusal is based on conscientious religious opposition to war and to preparation for war." has stood the test of litigation for these many years since it was rendered in 1933.

Reliance on Girouard vs United States, 328 U.S. 61, 66 S. Ct. 826, 90 L. Ed. 1084, indicates a rather wide stretch of the imagination as it was merely held that "an alien who is willing to take the oath of allegiance and to serve in the army as a noncombatant, but who, because of religious scruples, is unwilling to bear arms in defense of this Country, may be admitted to citizenship."

In fact the court held that the *statutory* requirement that an applicant for admission to citizenship take an oath to support and defend the constitution and laws of the United States against all enemies does not operate to exclude from citizenship one unwilling to take up arms in the country's defense. The court *went* on to say that failure of Congress to enact amendments to the Naturalization law of the United States so as to nullify the affect of a construction by the Supreme Court as excluding from naturalization one unwilling to bear arms in defense of the United States, and its re-enactment in pre-existing form of the pertinent provision of such law, may not be construed as a legislative adoption of such construction of the question so as to preclude judicial reconsideration of the question of construction particularly where Congress in enacting legislation relaxing naturalization requirements for aliens who have served in the armed forces of the United States made no change in the oath and no distinction between those serving in a combatant and in a noncombatant capacity. The 1942 amendment to the Nationality Act shows that Congress does not intend to exclude conscientious objectors from naturalization. Obviously the court has relied upon the statute in applying these principles.

University of Maryland vs. Murray, 169 Md. 478, established the equal treatment principal by admitting a negro to the State University Law School. In the instant case there appears to be no violation of the rule laid down by University of Maryland vs. Murray as the evidence in

this case indicates that the exemptions which have been described as a part of the requirement for military training is applicable to all students witnin the classifications set forth.

The plaintiff has constantly referred to provisions of Selective Service Act and their application to conscientious objectors. A review of the Selective Training and Service Act of 1940 as found in 129 ALR—Sec. 5-(g):

> "Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by *the local board shall,* if he is inducted into the land or naval forces under this Act, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be assigned to work of national importance under civilian direction."

It is within the legislative power and discretion to determine what persons shall be liable to call for military duty and in what order they shall be called. Although the government has the right, ordinarily, to demand the military services of every able-bodied citizen or national, such right is subject to certain limitations and restrictions from military duty. Aliens are ordinarily not subject to draft, unless they have declared their intention to become citizens, in which case they are usually included within the provisions of the compulsory service statutes for the exemption from service, or from combatant service, of conscientious objectors. In the absence of such provisions, however, conscientious objection to war or military service is not a valid ground of exemption. The grant of exemption to conscientious objectors had been held to be, not a

matter of constitutional right, but wholly an act of grace upon the part of Congress. (1956 Cumulative Supplement, 36 Am Jur. 18.)

Hanauer has been granted immunity from military training under the Selective Service Act in compliance with the terms of the Act itself and not because of any constitutional right. He has served for slightly more than two years in social service work in Caroline Mission, St. Louis, Missouri where, the court is inclined in the absence of evidence to the contrary to believe there was no organized training. The exemptions provided for by the University of Maryland do not cover that type of service therefore there is no basis for exception under the theory that he had satisfied the requirements of the Selective Service Act.

Sustaining the President and Board of Regents of the University of Maryland in the enforcement of regulations which are set forth in the catalogue and which, according to the evidence in this case had been applied uniformaly to all male students, not with the avowed purpose of creating a military organization but for the purpose of "training a man to better perform his duties as a citizen of the United States and of his community, to understand the impact of international tensions, world organization, the place of the United States in the family of nations, and his responsibility as a citizen to support his country", with the same decree of purpose that requires the compulsory taking of a course in American Civilization by *"all freshmen and sophomores"*; the regulation that all students are required to take twelve semester hours of English or that all eligible students are required to take physical education during the first two years of attendance, with prescribed exemptions. These required courses have been prescribed for all students of the University by the Board of Regents under the legislative authority vested in them

and do not appear to be arbitrary, unreasonable or discriminatory in any sense of the word.

The contention that Hanauer has not been given credit for the period of time during his substituted service under the Selective Service Act is not sound. He would not be exempt from basic military instruction as such service does not fall within the seven basic exemptions from such instruction which applies to all male students. To rule otherwise would be placing this plaintiff in a category by himself which would, by judicial act, be discriminatory, unfair and unjust so far as other students of the University are concerned and since it is well settled that the Board of Regents of the University of Maryland may suspend a student by reason of his refusal to take the regular prescribed course in military training, although such refusal is based on a conscientious religious opposition to war and to preparation for war, and since the requirement does not appear to violate the Fourteenth amendment of the Constitution of the United States nor the Bill of Rights of the Constitution of the State of Maryland, nor any stautory restrictions or rights thereunder but is within policy making powers of said Board, the petition for Writ of Mandamus is hereby denied this 19th day of July, 1957.

/s/ JOHN R. FLETCHER,
Judge

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

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Law No. 8783

JACK A. CRABILL, Plaintiff,

v.

WILSON H. ELKINS, PRESIDENT of the University of Maryland, et al., Defendants.

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Filed January 14, 1958

## OPINION OF COURT AND ORDER SUSTAINING DEMURRER WITHOUT LEAVE TO AMEND

The plaintiff in this case has filed a petition for writ of mandamus against the defendants. He seeks admission to the University of Maryland as a full time freshman student without taking the basic military training which is generally required of all able-bodied male students during their first and second years of undergraduate work. In addition to the prayer for the issuance of the writ requiring his admission, he also prays for general relief. The defendant have demurred to the whole and each paragraph of the petition.

While the petition is some ten pages in length the essential facts upon which the petitioner seeks relief are few. He alleges that in September 1956 at the beginning of the 1956-1957 college year he entered the University as a full time student but sought to be excused from the Reserve Officer Training course prescribed for first and second year students under the rules and regulations of the University adopted by the Board of Regents and published in the catalogue, stating that participation in this course was contrary to his religious and conscientious

beliefs. The catalogue listed the following exemptions from military instruction:

"BASIC EXEMPTION FROM MILITARY INSTRUCTION

1. Students who have completed the basic course in other approved units of the United States Air Force, Army, or Naval R.O.T.C. will receive credit.

2. Students holding commissions in the Reserve Corps of the Army, Navy, Marine Corps, Coast Guard, or Air Force will receive credit.

3. Students who have served in the Army, Navy, Marine Corps, Coast Guard, or Air Force for a period of time long enough to be considered equivalent to the training received in the A.F.R.O.T.C. program will receive credit. Short periods of service in any of the branches named above will be evaluated and allowed as credit toward completion of the course.

4. Graduate students will be exempt.

5. Students classified as "special Students" who are registered for less than seven semester hours will be exempt.

6. Students who have passed their thirtieth birthday before starting the course will be exempt from any part of the course not already completed.

7. Students who are not citizens of the United States or one of its territorial possessions will be exempt. Students having applied for United States citizenship will not be exempt."

He exhibited to the officials of the University his selective service certificate of release from civilian work, showing that he had registered for the draft under the Selective Service Act under the provisions of Sec. 6(j) of that Act. This showed that he had been given the classification of a conscientious objector because of his religious convictions against the study, use, and bearing of arms. He had been ordered by the Selective Service System to report for civilian work contributing to the maintenance

of the National health, safety, or interest, and had served approximately two years at the Brethren Service Center at Falfurrias, Texas, and at New Windsor, Maryland, with the Brethren Service Center. His request was refused but he nevertheless entered the prescribed course of military training in the A.F.R.O.T.C. of the University "under protest". Throughout his first semester he was in correspondence with the officials of the University witl reference to the exemption requested. However, at the end of the first semester he declined to take further military training and continued to study at the University as a "special student", thereby exempting himself from further requirement of military training.

His assumption is that a State institution receiving federal contribution in aid of its military training courses is precluded from requiring basic military training as a condition to attendance, on the basis that the federal military training requirement is satisfied by having conscientious objectors undertake non-military social work as a substitute. He alleges violation of his Constitutional rights and guaranties under the State and federal Constitutions.

The case here is quite similar to that of *Hanauer* v. *Elkins,* Law No. 8584, which was decided adverse to the petitioner for mandamus after a full hearing on the facts, and which is presently being appealed by the petitioner in that case, No. 173 September Term, 1957. Judge Fletcher, who heard the case, filed a comprehensive opinion on the facts and law upon the authority of *University* v. *Coale,* 165 Md. 224; and *Hamilton* v. *University of California,* 293 U. S. 245,264. This member of the Court fully agrees with the decision of Judge Fletcher in the Hanaur case. Inasmuch as the petitioner in that case was represented by the same counsel as the plaintiff herein it is deemed unnecessary to prolong this opinion by paraphrasing the reasoning of Judge Fletcher, or repeating the authorities cited by him.

The petitioner relies upon the Supreme Court decision in the case of *Girouard* v. *United States*, 328 U. S. 61. That case arose under the Naturalization laws and is not in point in a situation where the question involves the right of a state university to require basic military training by able-bodied male students enrolled in the freshman and sophomore classes. With reference to the right of a state university to require such training the decisions in the Hamilton and Coale cases, supra, still constitute the interpretation of the applicable law by the Supreme Court of the United States, and the court of last resort of this State.

The fact that the Universal Military Training and Service Act (50 U.S. C.A., App. 451, *et seq.*) provides for substitute service in non-military social work does not preclude the State University from prescribing more stringent requirements with reference to the training and education of its students. Sec. 456 (j) of 50 U.S.C.A., App. provides that "nothing contained in this title shall be construed to require any person to be subject to combat training." This provision relates only to the matter of Selective Service and bears no relationship to the right of the State, through its own agencies, to require military training for its own able-bodied citizens. The provision made for conscientious objectors by the Universal Military Training and Service Act is a matter of grace enacted by Congress and does not go beyond the scope of that particular law. Exemption from military training is purely a matter of grace and does not involve any Constitutional right or guaranty.

After carefully reviewing the contents of the petition and the briefs filed by counsel on both sides, it is the Court's conclusion that the petitioner has set forth no grounds for relief by way of mandamus, assuming that the material allegations contained therein are manifest from the exhibits filed herein or could be proven by appropriate evidence.

Nor is a prayer for general relief appropriate in a petition for mandamus. *District Heights* v. *County Commissioners*, 210 Md. 142, 146.

For the reasons set forth above it is by the Circuit Court for Prince George's County, Maryland, this 14th day of January, 1958,

ADJUDGED AND ORDERED that the demurrer herein be, and the same is hereby, sustained without leave to amend, the petition dismissed, and judgment is entered in favor of the defendants for costs.

CHARLES C. MARBURY
Judge

IN THE COURT OF APPEALS OF MARYLAND
September Term, 1957

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No. 173

KENNETH GEORGE HANAUER and JACK CRABILL

v.

WILSON H. ELKINS, President of The University of Maryland, et al.

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BRUNE, C. J.,
HENDERSON,
PRESCOTT,
HORNEY,
CARTER, J. DEWEESE
(Specially Assigned),
JJ.

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Opinion by Henderson, J.

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Filed: June 3, 1958

The appellants, Kenneth George Hanauer and Jack A. Crabill, claiming to be conscientious objectors, filed petitions in the Circuit Court for Prince George's County on January 16, 1957, for writs of mandamus directing the President and Board of Regents of the University of Maryland to allow them to continue as students in the University without conforming to the general requirement that all able-bodied male undergraduates take basic military training. The petitions were denied by the trial court and the petitioners appealed. Both cases involve the same constitutional questions and substantially the

same facts and were consolidated for the purpose of hearing the appeals. The writ was denied in the Hanauer case and judgment entered in favor of the appellees after full hearing and consideration of testimony. In the Crabill case, judgment was entered for the appellees by order of the trial court sustaining a demurrer to the petition, without leave to amend.

The material facts established by the evidence in the Hanauer case and alleged in the petition in the Crabill case are substantially similar. The Board of Regents of the University of Maryland adopted as a part of th curriculum of the University a course in the Reserve Officer Training Corps, which is conducted by United States Air Force personnel. The University, as a land-grant college, received federal funds under the Morrill Act (7 U.S.C.A., Sec. 304). Pursuant to the provisions of that Act, the University is required to offer a course in Reserve Officer Training Corps, which may be either elective or mandatory in the discretion of the University. The regulations concerning this course which have been adopted by the Board of Regents require that all male students under thirty years of age, who are citizens of the United States, except those specifically exempted by the regulations, take the basic two-year course during their first two years after matriculation. Included in the exemptions are those students who have completed the basic course in other approved units of the Army, Navy or Air Force R.O.T.C., or have served in the Army, Navy, Marine Corps, Coast Guard, or Air Force, for a period of time long enough to be considered equivalent to the basic training in the AFROTC course. Conscientious objectors are not expressly exempted.

The basic course was described as being "designed as a course training a man to better perform his duties as a citizen of the United States and of his community, to understand the impact of international tensions, world

organization, the place of the United States in the family of nations, and his responsibility as a citizen to support his country." The training includes instruction in the nature of a military force, that is, how the Army, Navy and Air Force combine together to form the defense force of the nation and their mission and responsibility as a combined defense force. The basic course involves learning to engage in military drill as a unit, and the wearing of an Air Force uniform, but completion of the basic course does not impose any subsequent military obligations. The purpose of the elective advanced course of two years, following the basic course, is to instruct Junior Officers of the United States Air Force and provide a major source of officer personnel for the regular Air Force. Insofar as the basic course is necessary in order to take the advanced course, the objectives of the advanced course are reflected in the basic course. United States Air Force officers conduct all classroom academic work and supervise drill on the field. Regulations covering the type of training offered by the course are the regulations of the United States Air Force which have been adopted by the University.

Both Hanauer and Crabill claimed to be conscientious objectors. Both profess to be followers of the teaching of Jesus Christ and believe from his teaching that violence and the killing of human beings is against the principles of the Christian religion. They are opposed to war or military training in preparation for war, as being contrary to their religious beliefs. Hanauer is a member of the Evangelical Reformed Church. Crabill is a member of the Church of the Brethren. The tenets of neither of these denominations require that its members be conscientious objectors, but it is their policy to show consideration to those members who are conscientious objectors and support them in their conviction. The sincerity of this religious belief by Hanauer and Crabill is not questioned by the officials of the University in either

case. Prior to their enrollment, both Hanauer and Crabill were classified by their local draft board as conscientious objectors under the provisions of the Universal Military Training and Service Act (50 U.S.C.A. App. 456(j)). This section of the Act provides for exemption from military training of conscientious objectors who are opposed to participation in war in any form and their assignment to work of national importance under civilian direction. Pursuant to this classification, each of the appellants served two years in civilian work after being inducted into service under the Selective Service Act and received their certificates of discharge as draftees.

Hanauer is twenty-four years of age and a citizen of Maryland. He enrolled as a third year student in the College of Education in September, 1956. He desired to become a student at the University because the cost is lower than a private school and he could receive the training required to become a high school teacher. At the time of his admission, he informed the officials he was a conscientious objector and that he could not take the required two year basic AFROTC course because it was against his religious beliefs. The officials of the University, through inadvertence, neglected to consider his case until after he had been admitted as a student and had entered upon the first semester. After consideration they advised him he must take the course or leave the University at the end of the first semester in January, 1957.

Crabill is twenty-five years of age and a citizen of Maryland. He enrolled as a first year student in the College of Education in September, 1956. At the time of his enrollment he likewise advised the University officials that he was a conscientious objector Upon being informed that he could not become a student unless he agreed to take the prescribed two year, basic course in AFROTC, he agreed to take the course under written protest. Afte experiencing the requirements of the

course he notified the officials, prior to the end of the first semester, that he could not continue as experience showed it was a military program in violation of his religious beliefs. The officials then notified him he must leave the University at the end of the semester because of his failure to take this required course. We think no distinction should be drawn between Crabill and Hanauer for present purposes, although the appellees argue that there is evidence of a waiver on Crabill's part.

The appellants' first contention is that the mandatory requirement that they take the basic course is contrary to the charter of the University and the Maryland Constitution. The charter of the University provides, in part, that "'no sectarian or partisan test shall be allowed or exercised * * * in the admission of students thereto, or for any purpose whatever * * *' and that the University shall be maintained for students of '* * * every religious denomination who shall be freely admitted to equal privileges of education and to all the honors of the college according to their merit without requiring or enforcing any religious or civil test'." Art. 36 of the Maryland Declaration of Rights provides that "all persons are equally entitled to protection in their religious liberty; wherefore, no person ought, by any law to be molested in his person or estate, on account of his religious persuasion or profession, or for his religious practice, unless, under the color of religion, he shall disturb the good order, peace or safety of the State, or infringe the laws of morality, or injure others in their natural, civil or religious rights * * *." Art. 37 forbids a religious test as a qualification for public office. It seems clear that the University, in requiring the basic course as a part of the curriculum, is not imposing a religious test. The same contention was considered and rejected by this Court in *University* v. *Coale*, 165 Md. 224, 235. The petitioner in that case was not required to assume any obligation to bear arms in the service of the State or the United

States, but was required to take a course similar in all material aspects to that now prescribed. The question is, as it was in the case cited, simply whether the policy of the University must yield to the views of the petitioners that the prescribed course is at variance with their personal and pacifist beliefs. The test of eligibility to attend the University is not directed at these petitioners. They are asserting a right to attend the University without compliance with a general condition which they are unwilling to meet, because of religious convictions personal to them. We think the Regulations adopted by the Board of Regents are well within any limitations imposed by the Constitution and laws of this State.

The apellants invoke the protection of the First and Fourteenth Amendments of the federal Constitution. We entertain no doubt that the University of Maryland is a branch or agency of the State Government. *University* v. *Murray,* 169 Md. 478, 483. If its exclusionary policy towards persons who are otherwise qualified, but who refuse to take the prescribed basic course, is a violation of rights guaranteed by the federal Constitution, then the policy of the State must yield. But we are not persuaded that such rights exist. The case of *University* v. *Coale, supra,* was appealed to the Supreme Court of the United States, but the appeal was dismissed for want of a substantial federal question. 290 U.S. 597. In *Hamilton* v. *University of California,* 293 U.S. 245, it was held by a unanimous court that a conscientious objector was properly excluded from the State University because of his refusal to take the required course in the R.O.T.C. Mr. Justice Butler, for the court, said (p. 262): "Taken on the basis of the facts alleged in the petition, appellants' contentions amount to no more than an assertion that the due process clause of the Fourteenth Amendment as a safeguard of 'liberty' confers the right to be students in the State University free from obligation to take military training as one of the conditions of attendance. Viewed

in the light of our decisions that proposition must at once be put aside as untenable." Mr. Justice Cardozo, concurring "to say an extra word", and joined by Justices Brandeis and Stone, said (p. 266): "The First Amendment, if it be read into the Fourteenth, makes invalid any state law 'respecting an establishment of religion or prohibiting the free exercise thereof'. Instruction in military science is not instruction in the practice or tenets of a religion. Neither directly nor indirectly is government establishing a state religion when it insists upon such training. Instruction in military science, unaccompanied here by any pledge of military service, is not an interference by the state with the free exercise of religion when the liberties of the constitution are read in the light of a century and a half of history during days of peace and war. * * * Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government. One who is a martyr to a principle—which may turn out in the end to be a delusion or an error—does not prove by his martyrdom that he has kept within the law."

The appellants contend that the authority of the *Hamilton* case has been undermined by the overruling of the cases of *U.S.* v. *Macintosh*, 283 U.S. 605, *U.S.* v. *Bland*, 283 U.S. 636, and *U.S.* v. *Schwimmer*, 279 U.S. 644, by the later case of *Girouard* v. *U.S.*, 328 U.S. 61. These cases all dealt with naturalization, and turned upon a question of the construction of Acts of Congress. Mr. Justice Douglas, for the court, in the *Girouard* case, said (p. 63): "The *Schwimmer*, *Macintosh* and *Bland* cases

involved, as does the present one, a question of statutory construction." The constitutional power of Congress to withhold citizenship upon condition that the applicant swear to bear arms was assumed. There was no intimation in either the majority or dissenting opinion that the *Hamilton* case was overruled.

The apellants also rely upon the case of *W. Va. State Board of Education* v. *Barnette*, 319 U.S. 624, overruling *Minersville School District* v. *Gobitis*, 310 U.S. 586, and holding unconstitutional a state act requiring a flag salute. But the *Hamilton* case was not overruled. In fact, it was cited and distinguished in the majority opinion by Mr. Justice Jackson, on the grounds that attendance in the *Hamilton* case was not compulsory, and because the State "has power to raise militia and impose the duties of service therein upon its citizens." There were also intimations that the requirement had no substantial or apparent relation to the public welfare, and that the flag salute was a form of utterance compelling the students to declare a belief. Mr. Justice Frankfurter in his dissent, conceded that the *Hamilton* case was not overruled, but found it impossible to distinguish it, at least upon the first ground assigned. We need not speculate as to where the line may ultimately be drawn or redrawn. Unless and until the *Hamilton* case is overruled, we think it is controlling, so far as the interpretation of the federal Constitution is concerned, in its application to the facts of the instant case.

The appellants further contend that since they have completed their obligation to serve under the Universal Military Training and Service Act, by performance of "civilian work contributing to the maintenance of the national health, safety, or interest", it is a violation of their "privileges and immunities" under the Fourteenth Amendment to require them to take the AFROTC basic course. But we think the answer is that the Act of

Congress according the exemption was a matter of grace, not conferring any federal right that would preclude this State from refusing to accord an equivalent exemption to students applying for admission to the State University. Cf. *In re Summers*, 325 U.S. 561, 572. If we assume, without deciding, that Congress has any Constitutional power to supersede the State policy in the training of its youth, it is sufficient to say that Congress has not yet attempted to do so. Nor do we think that the requirement is discriminatory or denies the equal protection of the laws to these appellants. The appellants have not taken the prescribed course elsewhere, and the Regulations of the University require all persons in their age group to take the course if they have not taken it elsewhere. *Brown* v. *Board of Education*, 347 U.S. 483, relied on by the appellants, turned upon a question of racial discrimination. *Fowler* v. *Rhode Island*, 345 U.S. 67, and cases therein cited, turned upon an issue of freedom of speech. We think these cases are readily distinguishable and not in point.

JUDGMENTS AFFIRMED, WITH COSTS.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

## No. 580

KENNETH GEORGE HANAUER AND
JACK A. CRABILL,
*Appellants,*

v.

WILSON H. ELKINS, PRESIDENT OF THE
UNIVERSITY OF MARYLAND, ET AL.,
*Appellees.*

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

## MOTION TO DISMISS AND SUPPORTING BRIEF

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

## No. 580

KENNETH GEORGE HANAUER AND
JACK A. CRABILL,

*Appellants,*

v.

WILSON H. ELKINS, PRESIDENT OF THE
UNIVERSITY OF MARYLAND, ET AL.,

*Appellees.*

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

## MOTION TO DISMISS

The Appellees in the above entitled case move to dismiss on the ground that the questions presented do not present a substantial federal question.

## SUPPORTING BRIEF

This brief is submitted in support of the aforegoing Motion to Dismiss.

## STATEMENT OF THE CASE

This is an appeal pursuant to 28 U.S.C.A. Section 1257(2) by the Appellants Hanauer and Crabill from the affirmance by the Court of Appeals of Maryland of the denial of a Writ

of Mandamus to the President and the Board of Regents of the University of Maryland to admit the Appellants to the University without conforming to the general requirement that all able-bodied male undergraduates take basic military training on the basis that the Appellants are conscientious objectors.

## STATEMENT OF THE FACTS

The Appellant Hanauer was inadvertently admitted by a faculty representative of the University of Maryland as a third year student for the first semester, September 1956, without enrolling him in the basic course of miltary training as required by the rules of the University. After admission Hanauer brought the matter to the attention of the University officials who advised him that he must either enroll in basic military training at the end of the first semester or withdraw from the University. During the last month of the first semester Hanauer filed a Petition for a Writ of Mandamus in the Circuit Court for Prince George's County seeking to continue in the University without enrolling in the basic course of military instruction provided by the Air Force Reserve Officers Training Corps. Appellant Crabill actually enrolled and took the first semester of basic military instruction under written protest.

## ARGUMENT

There is no substantial federal question presented in the Appellants' Jurisdictional Statement. This Court so held by summary dismissal in *Coale v. Pearson*, 290 U.S. 597. *Hamilton v. University of California*, 293 U.S. 245 settled the right of a state university to deny admittance to a conscientious objector who refused to comply with a general requirement of basic military instruction for able-bodied male students. The students in both the *Coale* case and

the *Hamilton* case, *supra*, raised the numerous allegations of the infringement of constitutional rights presented by the Appellants. The precise contentions were raised and discounted by this Court in the *Hamilton* case.

> "The allegations of the petition do not mean that California has divested itself of any part of its power solely to determine what military training shall be offered or required at the university (page 258).
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> * * * * * *
>
> "Nor is the allegation that the courses are prescribed by the War Department to be taken literally. We take judicial notice of the long-established voluntary co-operation between federal and state authorities in respect of the military instruction given in the land grant colleges. The War Department has not been empowered to determine or in any manner to prescribe the military instruction in these institutions. The furnishing of officers, men and equipment conditioned upon the giving of courses and the imposing of discipline deemed appropriate, recommended or approved by the Department does not support the suggestion that the training is not exclusively prescribed and given under the authority of the State (pages 259-260).
>
> * * * * * *
>
> "Undoubtedly every State has authority to train its able-bodied male citizens of suitable age appropriately to develop fitness, should any such duty be laid upon them, to serve in the United States army or in state militia (always liable to be called forth by federal authority to execute the laws of the Union, suppress insurrection or repel invasion, * * *) or as members of local constabulary forces or as officers needed effectively to police the State. And, when made possible by the national government, the State in order more effectively to teach and train its citizens for these and like purposes may avail itself of the services of officers and equipment belonging to the military establishment of the United States (page 260).
>
> * * * * * *

> "They are seeking education offered by the State and at the same time insisting that they be excluded from the prescribed course solely upon grounds of their religious beliefs and conscientious objections to war, preparation for war and miltary education" (page 262).

The Court held this proposition untenable.

> "Plainly there is no ground for the contention that the regents' order, requiring able-bodied male students under the age of twenty-four as a condition of their enrollment to take the prescribed instruction in military science and tactics, transgresses any constitutional right asserted by these appellants" (page 265).

Judge Cardozo, concurring, "to say an extra word", observed:

> "Instruction in military science is not instruction in the practice or tenets of a religion (page 266).
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> * * * * * *
>
> "The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government. One who is a martyr to a principle — which may turn out in the end to be a delusion or an error — does not prove by his martyrdom that he had kept within the law" (page 268).

The Appellants seek to minimize the controlling effect of those two decisions by quoting and referring to decisions in other fields. They place great emphasis on this Court's reversal of position in construing the naturalization statute. *United States v. Schwimmer*, 279 U.S. 644; *United States v. Macintosh*, 283 U.S. 605; *Girouard v. United States*, 328 U.S. 61; and *Cohenstaedt v. Immigration and Naturalization*

*Service*, 339 U.S. 901. Although the dictum in those cases may be fascinating to the Appellants, nevertheless, in the words of Justice Douglas:

> "The Schwimmer, Macintosh and Bland Cases involved, as does the present one, a question of statutory construction." *Girouard v. United States*, 328 U.S. 61, 63 *supra.*

The cases of racial segregation in schools are of little assistance here. *University of Maryland v. Murray*, 169 Md. 478; *Sipuel v. University of Oklahoma*, 332 U.S. 631; *Brown v. Board of Education of Topeka*, 347 U.S. 483; *Bolling v. Sharpe*, 347 U.S. 497; *Frasier v. Board of Trustes*, 134 Fed. Sup. 589, affirmed *per curiam*, 350 U.S. 979; and *Adams v. Lucy*, 228 Fed. 2d 619. Even further afield are cases involving the right to hold religious services in parks (*Niemotko v. Maryland*, 340 U.S. 268 and *Fowler v. Rhode Island*, 345 U.S. 67) and suits to restrain schools from permitting religious training during school hours (*Illinois v. Board of Education*, 333 U.S. 203 and *Zorach v. Clauson*, 343 U.S. 306). *Everson v. Board of Education*, 330 U.S. 1, involved the legality of a State's reimbursing parents for transportation of children to a parochial school. Cases involving the right of a state to require students in a compulsory education system to salute the flag has little relevance to the right of a university, where attendance is non-compulsory, to require basic military training. Compare, *Minersville School District v. Gobitis*, 310 U.S. 586 and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624. This Court in the *West Virginia State Board of Education* case, *supra*, distinguished the *Hamilton* case on the basis that attendance at the university was not compulsory and reaffirmed that the

> "State has power to raise militia and impose the duties of service therein upon its citizens" (page 632).

This power of the state has been long recognized by the Supreme Court. Compare Justice Harlan's statements in *Jacobson v. Mass.*, 197 U.S. 11, 29:

> "* * * yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interest, or even his religious or political convictions, to take his place in the ranks of the army of his country, and risk the chance of being shot down in its defense."

If this were a question of initial impression the dictum in other civil rights matters may give some guidance to the Court. Here the question raised by the Appellants has been decided adverse to their contention, by this Court for almost a quarter of a century. The contentions they raise were raised in the earlier adjudications. The *Hamilton* case has been cited many times throughout the years by this Court without criticism or unfavorable reflection. It was cited with apparent approval in 1952 when the Court affirmed the action of the Supreme Court of Illinois in denying a conscientious objector admittance as an attorney-at-law solely on the basis that he would be unable to comply with the state law which made all able-bodied males members of the state militia. Compare Sections 1 and 5, Article 65, Annotated Code of Maryland (1957 Ed.). That decision was not affected by the current draft law which grants limited exemption to conscientious objectors. *Re Summers*, 325 U.S. 561, 572. The Appellants' speculative hope that this Court will reverse itself is succinctly stated on page 14, Appellants' Jurisdictional Statement "And in light of this Court's reinterpretation of the Federal Constitution * * *".

It has long been recognized that any exemption from military duty which Congress may grant is a matter of grace and not a matter of constitutional right. The Courts will not extend the special privilege granted by Congress

and will firmly establish its limits. A conscientious objector cannot subjectively establish his rights. The Court of Appeals for the Ninth Circuit carefully analyzed the conscientious objector's privilege in affirming a conviction of a conscientious objector, *George v. United States*, 196 Fed. 2d 445, *cert. den.* 344 U.S. 843. Congress has given a restricted privilege to the conscientious objector in the draft law as a shield. These Appellants have attempted to take that shield and mold it into a sword. What has been given to the Appellants as a matter of grace by the Congress they have attempted to use against the University of Maryland to demand special exemption. The Appellants seek to use the Writ of Mandamus to obtain from the judiciary a privilege which must be given by the Legislature.

In the Universal Military Training and Service Act, the Congress, as a matter of grace, has permitted the conscientious objector to take private social work in lieu of federal military training. Nowhere in the Act is the conscientious objector granted a universal exemption or exception from other civil or military obligations. The privilege granted the conscientious objector is expressly limited to the draft law. Attention is invited to the first sentence of the subsection which grants draft exemption to the conscientious objectors:

> "Nothing contained *in this title* shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." (Italics supplied.) (50 U.S.C.A. App. Section 456(j)).

The Appellants' apparent reasoning is that since Congress has granted a special exemption to conscientious objectors from the military training requirements of the draft law, therefore the states have lost their right to require military

training of their own citizens. Whether Congress could do this as a matter of constitutional right is doubtful. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 652. It is unnecessary to consider the constitutional limitations on the right of Congress to prevent a state or its agency from training its own citizens for military duty, since there is nothing in the draft law which either requires or implies this construction.

The Appellants propose to extend the limited exemption from military conscription which was granted to conscientious objectors by Congress under the Universal Military Training and Service Act of 1948, to a general exemption from all military duty to either the State or the Nation as a matter of constitutional right. This Court has held there is no constitutional privilege in the *Hamilton* case, *supra*. Congress in recodifying Title 10 granted no exemption from compulsory AFROTC to conscientious objectors. Compare 10 U.S.C.A. Section 9382 (Act of August 10, 1956, Public Law 1028, Chapter 1041) which the Appellants quoted in part as a footnote on page 11 of their Jurisdictional Statement. It is interesting to read the whole sub section (3):

> "(c) No unit may be established or maintained at an institution, unless—
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> * * * * * *
>
> (3) the authorities of the institution, other than a State university or a State institution required to provide military instruction under section 304 of title 37, agree to establish and maintain a two years' elective or compulsory course of military training as a minimum for its physically fit male students the completion of which is a prerequisite for the graduation of any student beginning the course unless he is relieved of this obligation under regulations prescribed by the Secretary."

If Congress had intended an exemption for conscientious objectors from AFROTC, why was no exemption noted in the statute which was to control the establishment and management of AFROTC units from a federal viewpoint? Particularly, after the decision in *Hamilton v. University of California, supra*.

The Appellant Hanauer in the trial court recognized that he was not entitled to the benefits of the G. I. Bill of Rights (Service-men's Readjustment Act of 1944, 38 U.S.C.A., Chapters 11C, 12A and 14) although he was quick to assert a belief that private civil work should entitle him to that benefit also. If Congress had intended the exemption contained in Section 456(j) to extend beyond that sub-title and to make social work the equivalent of military training for all purposes, Hanauer would have some color of validity given to his claim to benefits under the G. I. Bill of Rights. If substitute service is not sufficient for federal G. I. Bill benefits, it is not fair to assert that it is a substitute for a state's requirement of military training for its own citizens.

The draft law exemption for conscientious objectors does not include a person whose objection is merely a matter of personal philosophy. 50 U.S.C.A. App. Section 456(j):

> "Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

In the trial court Hanauer testified that his objection was not based on the tenets of his religious denomination, but was a matter of personal code and personal philosophy. Even though Hanauer has previously qualified for a conscientious objector's exemption, it is possible that, in light

of his assertion under oath, he no longer meets the requirements of the draft law. It is not necessary to view this aspect of the Appellant's sincerity since the draft law by virtue of its own restrictive language does not affect a state's right to training its own citizens.

The essential difference between the *Hanauer* case and the *Crabill* case is that the latter actually took basic military training his first semester, even though under protest. This would not only impugn Crabill's basic sincerity, but would amount to waiver.

## CONCLUSION

The Appellants, as alleged conscientious objectors, are not entitled to special exemption from the general rule of the state university that all able-bodied male undergraduates successfully complete basic military training as a requirement for graduation. This question was decided by this Court in *Hamilton v. University of California.* The curriculum is a matter within the sole discretion of the governing board of the university. The draft law does not attempt to give conscientious objectors any rights beyond an exemption from military training under that law. The Appellants have fully litigated their claim in the State courts and have failed to present a substantial federal question to this Court. The motion to dismiss this appeal should be granted.

Respectfully submitted,

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